

# Montgomery County Planning Board

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Date Mailed:

December 5, 2024

MCPB No. 24-104  
Forest Conservation Plan No. F20240740  
ELP Bethesda  
Date of Hearing: October 24, 2024

## **RESOLUTION**

WHEREAS, under Montgomery County Code Chapter 22A, the Montgomery County Planning Board is authorized to review forest conservation plan applications; and

WHEREAS, on April 3, 2020, the Planning Board approved Preliminary Forest Conservation Plan No. H-135 by MCPB Resolution No. 20-020 to establish a preliminary forest conservation plan on approximately 36.02 acres of land located at 10400 Fernwood Road (“Subject Property”) in the *Rock Spring Sector Plan* area; and

WHEREAS, on March 10, 2022, the Planning Board approved Final Forest Conservation Plan (“FFCP”) No. 820210190 by MCPB Resolution No. 22-014, concurrently with Site Plan No. 820210190, for the area of the entire Subject Property; and

WHEREAS, on June 21, 2022, the Planning Board approved FFCP No. 820220120 by MCPB Resolution No. 22-055, concurrently with Site Plan No. 820220120, which superseded the prior FFCP for the entire Subject Property; and

WHEREAS, on July 19, 2024, ELP Bethesda c/o Grandview, LLC (“Applicant”) filed an application for approval of a forest conservation plan that would supersede the prior FFCP approvals and apply to the entirety of the Subject Property, concurrently with applications for Site Plan No. 820240130 and Site Plan Amendment No. 82022012A; and

WHEREAS, Applicant’s forest conservation plan application was designated Forest Conservation Plan No. F20240740, ELP Bethesda (“Forest Conservation Plan” or “Application”); and

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Approved as to  
Legal Sufficiency: /s/ Allison Myers  
M-NCPPC Legal Department

WHEREAS, following review and analysis of the Application by Planning Board Staff (“Staff”) and other governmental agencies, Staff issued a memorandum to the Planning Board dated October 14, 2024, providing its analysis and recommendation for approval of the Application, subject to certain conditions (“Staff Report”); and

WHEREAS, on October 24, 2024, the Planning Board held a public hearing on the Application and voted to approve the Application subject to conditions, on the motion of Commissioner Hedrick, seconded by Commissioner Linden, with a vote of 5-0; Chair Harris, Vice Chair Pedoeem, Commissioners Bartley, Hedrick, and Linden voting in favor.

NOW, THEREFORE, BE IT RESOLVED that the Planning Board APPROVES Forest Conservation Plan No. F20240740 on the Subject Property by superseding the conditions of approval of the previously approved Final Forest Conservation Plans and replacing them with the following conditions<sup>1</sup>:

1. The Applicant must schedule the required site inspections by M-NCPPC Forest Conservation Inspection Staff per Section 22A.00.01.10 of the Forest Conservation Regulations.
2. The Applicant must comply with all tree protection and tree save measures shown on the approved Final Forest Conservation Plan (“FCP”). Tree save measures not specified on the Final Forest Conservation Plan may be required by the M-NCPPC Forest Conservation Inspection Staff.
3. Prior to certification of the Final Forest Conservation Plan, the Applicant must include the Variance Exhibit with the plans submitted for approval.
4. Prior to recordation of the plat for this development Application, the Applicant must record a Category I or II Conservation Easement over all areas of forest planting and environmental buffers as specified on the approved Final Forest Conservation Plan. The Category I or II Conservation Easement must be in a form approved by the M-NCPPC Office of the General Counsel and must be recorded in the Montgomery County Land Records by deed. The Book/Page for the easement must be referenced on the record plat. Demolition, clearing and grading are permitted within the easement prior to planting.
5. Prior to approving the first above-ground building permit for this development Application, the Applicant must submit financial surety, in a form approved by the MNCPPC Office of the General Counsel, to the M-NCPPC Planning Department for the 3.11 acres of new forest planting and for the mitigation trees and maintenance, including

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<sup>1</sup> The previously approved Forest Conservation Plan conditions were contained in Condition 6 of Site Plan No. 820220120. Condition 6.a through 6.l have been renumbered to be conditions 1 through 12 of Forest Conservation Plan No. F20240740.

invasive species management controls, credited toward meeting the requirements of the FCP.

6. Prior to approving the first above-ground building permit for this development Application, the Applicant must record an M-NCPPC approved Certificate of Compliance in an M-NCPPC approved off-site forest bank within the Cabin John Creek watershed to satisfy the reforestation requirement for a total of 2.25 acres of mitigation credit. The offsite requirement may be met by purchasing credits from a mitigation bank elsewhere in the County, subject to Staff approval, if forest mitigation bank credits are not available for purchase within the Cabin John Creek watershed or by making a fee-in-lieu payment if no forest mitigation bank credits are available.
7. Prior to the initial planting acceptance inspection by the M-NCPPC Forest Conservation Inspection Staff, the Applicant must install permanent conservation easement fencing and signage along the perimeter of the conservation easements as shown on the FCP, or as directed by the M-NCPPC Forest Conservation Inspection Staff.
8. Prior to approving the first above-ground building permit for this development Application, the Applicant must execute a five-year Maintenance and Management Agreement (“MMA”) in a form approved by the M-NCPPC Office of General Counsel. The MMA is required for all forest planting areas, mitigation tree plantings, including variance tree mitigation plantings, and landscape plantings credited toward meeting the requirements of the FCP. The MMA includes invasive species management control measures. All proposed measures should be chosen with consideration of the proximity to the on-site stream and wetlands. The use of herbicides should be avoided where possible.
9. The Applicant must install the Afforestation/Reforestation plantings for Planting Areas A and B (outside of the limits of disturbance (“LOD”)) as shown on the approved FCP, prior to the release of the first Use and Occupancy Permit for the Marketing Building or as directed by the M-NCPPC Forest Conservation Inspection Staff.
10. The Applicant must plant the variance tree mitigation plantings on the Subject Property with a minimum size of 3.5 caliper inches totaling at least 293 caliper inches as shown on the approved FCP. Adjustments to the planting locations of these trees is permitted with the approval of the M-NCPPC Forest Conservation Inspection Staff.
11. Prior to the release of the first Phase 1A residential Use and Occupancy Permit, or as directed by the M-NCPPC Forest Conservation Inspection Staff, the Applicant must install the variance tree mitigation plantings as shown on the FCP.
12. The Limits of Disturbance (“LOD”) shown on the Final Sediment and Erosion Control Plan must be consistent with the LOD shown on the approved Final Forest Conservation Plan.

13. Within the first planting season following the stabilization of the applicable disturbed area inside of the LOD, or as directed by the M-NCPPC Forest Conservation Inspection Staff, the Applicant must install the Afforestation/Reforestation plantings for planting areas inside the LOD, as shown on the approved FCP.
14. Before the approval of the Certified Forest Conservation Plan, the Applicant must update the five-year Maintenance and Management Agreement (“MMA”) to include all changes to the approved variance trees.

BE IT FURTHER RESOLVED that having given full consideration to the recommendations of its Staff as presented at the hearing and/or as set forth in the Staff Report, which the Board hereby adopts and incorporates by reference (except as modified herein), and upon consideration of the entire record, the Planning Board FINDS, with the conditions of approval, that:

1. *The Application satisfies all the applicable requirements of the Forest Conservation Law, Montgomery County Code Chapter 22A, and ensures the protection of environmentally sensitive features.*

A. Forest Conservation

The Board finds that as conditioned, the Forest Conservation Plan complies with the requirements of the Forest Conservation Law.

The Preliminary Forest Conservation Plan H-135 was approved by Planning Board Resolution MCPB No. 20-020 dated April 3, 2020, during the review of the re-zoning of the Property, which included a Development Plan. A Final Forest Conservation Plan (FFCP) was approved by the Planning Board with Site Plan No. 820210190 on March 10, 2022 (Planning Board Resolution No. MCPB 22-014). FFCP No. 820220120 was approved June 21, 2022 (MCPB No. 22-055).

This approval, FFCP No. F20240740, will amend all previously approved Final Forest Conservation Plans and will apply to the entirety of the Subject Property, as shown in Phases 1A, 1B, 2, and 3 of the associated development applications. The forest mitigation requirement of 5.27 acres of afforestation is unchanged from the previously approved forest conservation plans, and the prior conditions of approval have been carried forward, as reflected in this approval, to enumerate the requirements that have been satisfied, as well as the requirements that remain in effect.

## B. Forest Conservation Variance

Section 22A-12(b)(3) of the Forest Conservation Law identifies certain individual trees as a high priority for retention and protection (“Protected Trees”). Any impact to these Protected Trees, including removal or any disturbance within a Protected Tree’s critical root zone (“CRZ”), requires a variance under Section 22A-12(b)(3) (“Variance”). Otherwise, such resources must be left in an undisturbed condition.

Through prior FFCP approvals, the Board has approved removal of 23 (twenty-three) trees that are 30 inches or greater DBH that are considered high priority for retention under Section 22A-12(b)(3) of the County Forest Conservation Law, and to impact, but retain six additional trees. Four additional trees proposed for removal (Numbers 15, 16, 17, and 18) were approved for removal under a variance approved with PFCP No. H-135. Removal of the variance trees required that 249.75 caliper inches of replacement trees be planted to mitigate for the water quality functions previously provided by the trees being removed. The previous FFCP noted the planting locations of 72 trees of 3.5 inches caliper to provide the required mitigation.

This Application will require the removal of five (5) additional Protected Trees as identified in the Staff Report. In accordance with Section 22A-21(a), the Applicant requested a Variance, and the Board agrees that the Applicant would suffer unwarranted hardship by being denied reasonable and significant use of the Subject Property without the Variance.

Per Section 22A-21, a variance may only be granted if the Planning Board finds that leaving the requested trees in an undisturbed state will result in unwarranted hardship. The requested variance is necessary due to the need to accommodate frontage improvements, utilities, stormwater management, removal of existing infrastructure, and stream restoration. Minor adjustments to the limits of disturbance to accommodate these actions have resulted in impacts that necessitate the removal of an additional five trees. Without removing the identified Protected Trees, the Applicant would be denied the ability to develop the property in furtherance of the *Rock Creek Sector Plan* and in conformance with the development standards of the zoning ordinance.

The Board makes the following findings necessary to grant the Variance:

1. *Granting the Variance will not confer on the Applicant a special privilege that would be denied to other applicants.*

Granting the variance will not confer a special privilege on the Applicant as

the disturbance is necessary to meet applicable Master Plan and Rock Spring and White Flint 2 Design Guidelines requirements and construct the development reflected in prior approvals. If the Applicant were not able to impact the variance trees, the Applicant would not be able to build and provide adequate facilities to support the approved development.

2. *The need for the Variance is not based on conditions or circumstances which are the result of the actions by the Applicant.*

The requested variance is not based on conditions or circumstances which are the result of actions by the Applicant. The requested variance is based upon the existing site conditions and the zoning, master plan and design requirements of the project. Specifically, trees 55 and 56 are impacted by required frontage improvements. Trees 64, 65 and 66 are impacted both by the grading necessary for construction of buildings RB-2.3 and RB-2.4 and the associated underground parking garage.

3. *The need for the Variance is not based on a condition related to land or building use, either permitted or non-conforming, on a neighboring property.*

The requested variance is a result of the existing conditions and not as a result of land or building use on a neighboring property.

4. *Granting the Variance will not violate State water quality standards or cause measurable degradation in water quality.*

The variance will not violate State water quality standards or cause measurable degradation in water quality. The Application proposes mitigation for the removal of these trees by planting new large-caliper replacement trees on site. These trees will ultimately replace the lost water quality of the trees being removed. Therefore, the Board finds that the project will not violate State water quality standards or cause measurable degradation in water quality.

Mitigation for the Variance is at a rate that approximates the form and function of the Protected Trees removed. The Board approves the replacement of Protected Trees at a ratio of approximately 1-inch caliper for every 4 inches removed using trees that are a minimum of 3.5-inch caliper in size. This results in a new mitigation of eight (8) inches, with a minimum installation of fourteen (14) 3.5-inch caliper trees. The new mitigation requirement increases the total caliper inches to be replaced to 293 inches, resulting in a requirement to provide a minimum of 84 trees with a 3.5-inch caliper.

BE IT FURTHER RESOLVED that this Resolution constitutes the written opinion of the Planning Board in this matter, and the date of this Resolution is

December 5, 2024

(which is the date that this Resolution is mailed to all parties of record); and

BE IT FURTHER RESOLVED that any party authorized by law to take an administrative appeal must initiate such an appeal consistent with the Maryland Rules for the judicial review of administrative agency decisions.

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**CERTIFICATION**

This is to certify that the foregoing is a true and correct copy of a resolution adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission on motion of Commissioner Hedrick, seconded by Vice Chair Pedoeem, with a vote of 4-0; Chair Harris, Vice Chair Pedoeem, and Commissioners Hedrick, and Linden, voting in favor of the motion, Commissioner Bartley was necessarily absent, at its regular meeting held on Thursday, November 21, 2024, in Wheaton, Maryland and via video conference.



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Artie L. Harris, Chair  
Montgomery County Planning Board